COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
09-KOSH-0249

KOSHRC 4695-09

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

EMERSON MASONRY, INC — RESPONDENT

* * * * * * * *

ORDER OF THIS REVIEW COMMISSION ON INTERLOCUTORY APPEAL AND ORDER REMANDING FOR A TRIAL ON THE MERITS.

This case comes to us on complainant's timely motion for interlocutory review which we granted. Section 45, 803 KAR 50:010. We asked the parties to submit briefs; we have received a brief from the complaint secretary, a responsive brief from Emerson Masonry and a reply brief from the complainant. With the pretrial record before us, in addition to the briefs, we are sufficiently informed to resolve this interlocutory appeal.

While this case was in the pretrial stage, respondent filed motions asking for discovery. Respondent moved to take the deposition of the compliance officer (CO). Our hearing officer denied respondent's motion; because respondent did not seek interlocutory review of the hearing officer's order denying permission to take the deposition, this matter is not before us.

Respondent submitted requests for production of documents. Because the parties have not submitted arguments about documents in their briefs to us on interlocutory review, we infer complainant's production of documents is not at issue, except of course for the compliance

officer's notes. Similarly, respondent filed requests for admission with complainant. Neither party addressed requests for admissions issues in their briefs to us. We infer complainant has answered the requests for admission or the matter has in some way been set aside or resolved.

Respondent moved for production of the compliance officer's notes which he took during his inspection and also moved to submit interrogatories to complainant. Complainant has within this interlocutory appeal objected to respondent's motion for the redacted notes and to respondent's motion to submit the interrogatories.

I.

The compliance officer's work notes.

Hearing Officer Head in the case before us today said he would, during the pretrial phase, conduct an *in camera* review of the notes before turning them over to Emerson. In Morel Construction,[1] an interlocutory order we issued on July 5, 2006, we had rejected this approach to the notes. In Morel we said the compliance officer's notes, those he had taken during his inspection, could only be turned over to respondent, in a redacted form, after the CO had testified on direct examination.

In its brief to the commission in the instant matter, the secretary quoted back to us the rules we had laid down in our Morel order which specified how the compliance officer's notes would be handled if it became necessary to make use of them during the trial. We had fashioned our procedures to release the redacted notes only after the CO had testified on direct out of our continuing, statutorily driven concern for protecting the identity of persons who had given the compliance officer information while the CO was conducting an inspection under the authority

[1] Morel Construction, et al, KOSHRC 4147-04, 4151-04, 4149-04, page 11. This order can be found on line at koshrc.ky.gov; select decisions of the KOSH review commission. We incorporate our Morel order by reference into the instant order.

of KRS 338.101 which authorizes him to question employers and employees in private. See also KRS 338.121.

This is how a respondent may obtain the compliance officer's notes in the federal system as well. Professor Mark Rothstein in Occupational Safety and Health Law, 2010 edition, page 536-537, says:

> After the CO has completed testifying on direct examination, upon motion by the employer, the Secretary must turn over to the employer all of the CO's notes and prior statements related to the subject of the testimony...Any material that might reveal the identity of confidential informants, however, need not be disclosed.

KRS 338.101 (1) (a) says a compliance officer "shall have the authority...to...question privately any such employer, owner, operator, agent, employee, or employee representative..." during his inspection. (emphasis added) KRE 501, privileges, says "Except as otherwise provided by...statute...no person has a privilege to...(2) Refuse to disclose any matter; (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing." KRE 501 says privileges[2] may be created by statute which KRS 338.101 did when it said the compliance officer could question privately employers, owners and employees. Then KRE 508 says:

> (a) General rule of privilege. The Commonwealth of Kentucky and its sister states...have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in any investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee...

Collectively, KRS 338.101 (1) (a), KRS 338.121 (1), KRE 501 and KRE 508 have created a mechanism whereby an informant's identity shall be protected. As we said in our Morel order,

[2] KRS 338.121 (1) says an employee may file an anonymous safety complaint and is thus privileged when he does so.

the informer's identity is by statute protected to preserve the free flow of information to the compliance officer, among other things. Morel.

In the case before us now, the compliance officer conducted a walk around inspection, two of them actually, at a construction site. During his second inspection the CO spoke with Emerson's owners who, being out of state at the time of the accident, could not arrive in time to participate in the first inspection; because no Emerson employees were on site on the date of the two walk arounds, April 28, 2009, the CO did not interview any Emerson employees.

During his first walk around inspection at the Emerson site on April 28, 2009, the compliance officer was accompanied by several subcontractors, employers, owners or managers, who were on site when the building collapsed. Emerson wants to obtain the redacted notes of that inspection before the trial commences. We presume Emerson wants to see what if anything these subcontractors told the compliance officer:

> Respondent merely seeks (1) the notes regarding interviews with Respondent's owners (which cannot logically be privileged) and (2) the notes regarding interviews with owners of other organizations on the job site.

Emerson responsive brief to the commission, page 9.

KRE 508 says the commonwealth has the "privilege to refuse to disclose the identity of a person who has furnished information." We know from our administrative experience in these cases a compliance officer may privately interview a number of persons on the job site. A cited employer who accompanies the CO on his walk around will know to whom the CO spoke; but what the employer will not know is who if anyone "furnished information."

This case raises for our review commission a novel issue: for an occupational safety and health case, to whom does the informer's privilege found in KRE 508 apply? KRS 338.101 (1) (a) supplies the answer; it says a compliance officer "shall have the authority...to...question

privately any such employer, owner, operator, agent, employee, or employee representative..." (emphasis added) This statute is not limited to the cited employer, cited owner or employee of a cited employer. Rather, the statute says the compliance officer, the "authorized representative" of the executive director, may question privately any employer, owner or employee. We hold the informer[3] privilege found in KRE 508 protects all persons questioned privately by the compliance officer during his two occupational safety and health walk around inspections; this protects owners, operators, managers and employees of other entities as well as the owners, managers and employees of cited respondent.

This of course raises the following question: under what circumstances may the secretary or the interviewed individual, employer or employee, waive the privilege? In Chemcentral, KOSHRC 2943-96, August 5, 1997, we found the company's procurement of waivers from five employees who talked with the inspecting compliance officer coercive. Because of their coercive nature, the waivers were drafted by Chemcentral's lawyer, we would not permit the hearing officer to use those waivers to release the CO's notes. We hold when an employer calls an employee as a witness in an occupational safety and health case or procures a waiver from the employee, he is being coerced. See our order on interlocutory review for The Okonite Company, KOSHRC 4734-10, June 1, 2010, pages 5 and 6. But as we have held, employers and owners regardless of their affiliations are also beneficiaries of the informer's privilege. How are their rights to be protected?

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[3] As we have previously expressed, we find the term informer unfortunate. Kentucky's occupational safety and health law encourages individuals to provide, in confidence, information to the compliance officer who can then use what he learns to discover hazards which threaten all who work at a particular site.

In the federal system, the commission has dealt with the issue of the informer's privilege and potential waivers. In Donald Braasch Construction, Inc,[4] CCH OSHD 31,259, page 43,867, BNA 17 OSHC 2082, 2084 (1997), the commission held:

> the Secretary did not waive the informer's privilege even though she had identified the twelve employees who had given statements to the Department of Labor. The Fifth Circuit[5] distinguished persons who had given statements from persons who were informers within the context of the privilege, concluding that if the employee is merely known to the employer as a 'statement giver, then disclosure of the statement might reveal him as an informer.'

From the record before us in the case at bar, we have learned the secretary turned over to Emerson the compliance officer's reports for B&B Contracting, United Builders of Indiana, J. L. Crane Concrete, Tradesmen International, General Steel, Crane and Rigging and D. W. Wright Properties which he prepared as a result of his first inspection of the Emerson work site. Emerson knows who the CO talked to, or at least who accompanied him on his first walk around inspection, the Emerson walk around being the second. Emerson does not know if any of the subcontractors provided the compliance officer with information of the type which would make them informants according to KRS 338.101 (1) (a), KRS 338.121 (1), KRE 501, KRE 508 and Donald Braasch. The Emerson owners who participated in the compliance office's second walk around of April 28, 2009 are beneficiaries of the same statutes and rules of evidence. Neither the statutes nor the rules of evidence we have cited make any provision for exceptions.

Based on our assumption the secretary continues to rely on KRE 508, we hold the compliance officer's notes from either the first or the second inspection may not be turned over to Emerson, even in a redacted form, prior to the trial of this case. Donald Braasch, our Morel

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[4] In Kentucky Labor Cabinet v Graham, Ky, 43 SW3d 247, 253 (2001), our supreme court said "As KOSHA is patterned after the federal act...KOSHA should be interpreted consistently with federal law."

[5] In Donald Braasch, the commission cited to Hodgson v Charles Martin Inspectors of Petroleum, Inc, 459 F2d 303, (CA 5 1972).

Construction order, KRE 508 and KRS 338.101. At trial, the compliance officer's notes, if Emerson continues to press the matter, will be released in redacted form to Emerson in conformity with the rules which we have laid down in our Morel Construction order dated July 5, 2006 and our order issued today – no exceptions will be permitted. We expect our hearing officers to exercise their professional judgment when deciding our cases which come before them; they have not disappointed us. Having said that, however, we require them to adhere to our procedural rules[6] which we have laid down in our regulations and our decisions.

In his March 10, 2010 order our hearing officer said he would not allow the compliance officer to testify, as an exception to hearsay found in KRE 801A (b) (4), about what Emerson's owners told him during their walk around inspection unless the redacted notes were provided to Emerson prior to the trial. On this point our hearing officer erred and we reverse him. The compliance officer will be permitted to testify as an exception to the rule against hearsay, assuming labor offers the proof necessary to trigger the application of the rule, about what Emerson's owners told him; and then after the conclusion of his direction examination, his notes which have been redacted according to our directions in our Morel order will be turned over to Emerson. Here we assume both Emersons will waive whatever privileges apply to them. A different result might obtain if, in addition to the Emersons, others who spoke privately with the compliance officer also participated in the Emerson inspection. Or perhaps one of the Emersons as well had exercised his rights set out in KRS 338.101 (1) (a) to speak privately with the CO. Donald Braasch.

If the subcontractors who participated in the first walk around of April 28, 2009 do not testify, Emerson would have no need to prepare for their cross examination; thus, there would be

[6] We know our regulations are not rules but refer to them as such as a matter of convenience. KRS 13A.120 (5).

no reason for the secretary to submit that portion of the CO's notes, if any. Donald Braasch. If, however, any of these subcontractors did testify, then the secretary and the hearing officer would have to revisit the matter in conformity with our Morel Contracting order. Emerson would not receive any notes which contained statements made by subcontractors who did not testify. Donald Braasch.

If no subcontractors testify, and so being neither parties nor witnesses, we do not believe the compliance officer could relate, over objection, what one or more of these subcontractors told him during the first walk around on April 28 without violating the rule against hearsay or the rules designed to protect an informer's privilege laid down by Donald Braasch.

In his order our hearing officer said that at the hearing, if the CO's notes were released in accordance with our Morel order, "The opposing party's attorney also will not be necessarily able to determine the implication of what is on the written page in the rush of the moment when the attorney receives the notes immediately after the witness testifies." Page 7 (emphasis added). We direct our hearing officer to afford Emerson's counsel sufficient time to review the notes and to prepare for cross examination of the compliance officer. Scheduling an extra day for the trial of this case would permit an over night adjournment if that were to prove necessary. If respondent required more time to prepare for cross examination based on the CO's notes, the trial could be concluded and another day scheduled for the cross examination.

II.

Emerson's interrogatory discovery motions.

Our hearing officer's March 10, 2010 discovery order from which labor appeals contains no discussion of section 27, 803 KAR 50:010, which says "Except by special order of the commission or the hearing officer, discovery depositions...and interrogatories...shall not be

allowed." (emphasis added) This is not acceptable. Our hearing officers must follow our rules as must we.

Because these are our discovery rules, it falls on us to interpret them as we have since promulgating them in 1975. Respondent Emerson seeks discovery by interrogatory and has submitted 19 questions. Labor objects to all of them. In his disputed order our hearing officer ordered labor to answer all interrogatories except for numbers 3, 8 and 19. On interlocutory appeal we must decide whether the hearing officer's order for discovery complies with our section 27 on discovery.

On its face our hearing officer's order does not conform to section 27 of our rules since it does not attempt to come to grips with what for us is the essential question: what factual circumstances must a party seeking discovery allege to obtain a special order from the commission. We could therefore simply reverse our hearing officer's discovery order without comment and hereafter likely shall. But because discovery, and concomitant requests for interlocutory review, have become such a contentious issue of late, we will answer the questions now before us.

But before deciding the question whether the secretary must, in the face of section 27 of our rules, answer the interrogatories served by respondent Emerson, we will first revisit several of our orders where we had occasion to examine our discovery rules.

On the issue of discovery raised in Elliot Electric,[7] KOSHRC 4502-07, September 8, 2008, a case before us on interlocutory appeal, we said:

> On the issue of discovery before this commission, only CR 26.02 (1) applies to our proceedings. This means our rules on discovery, sections 26, 27, 28 and 29, 803 KAR 50:010, preempt those found in the civil rules with the exception of CR 26.02 (1); and we so hold.

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[7] Go to koshrc.ky.gov and select interlocutory orders.

Only CR 26.02 (1) on the scope of discovery applies to our cases because, one, our rules contain no similar provision and, two, our section 4 says the civil rules shall govern our proceedings "In the absence of a specific provision." In Cherne Contracting, KOSHRC 4519-07, December 3, 2008, page 4, we said "because section 29 is primarily about the subpoenaing of documents...our hearing officers have often...looked to CR 34.01 on production of documents for guidance."

CR 26.02 (1) says in part "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter..." As we have already held, release of the compliance officer's notes is controlled by the privileges found in KRE 501, KRE 508, KRS 338.101 (1) (a), KRS 338.121 (1) and our Morel order, supra. Measured always by the limitations imposed by CR 26.02 (1), relevance and privilege, parties may have discovery of documents and may submit requests for admission. But as we have explained, our section 27 rule on discovery by deposition and interrogatory is more limited than our other rules. Section 27 says in part "Except by special order of the commission...discovery depositions of parties, intervenors or witnesses and interrogatories directed to parties, intervenors or witnesses shall not be allowed." (emphasis added) We promulgated section 27 of our rules to convey the idea that discovery by deposition and interrogatory is to be used sparingly. We have long interpreted the language of section 27 of our rules to discourage discovery. As we said in Chemcentral Corporation,[8] KOSHRC 2943-96, August 5, 1997, "We have historically limited discovery in occupational safety and health cases, under the authority of our rules, to insure that they move along expeditiously from contest of citations to a final decision by this commission." At page 8. Then in Morel Construction, footnote 11, supra, we said "The scope of information available to an employer in an OSHA case is as good an explanation as any for our rule which says

[8] Go to koshrc.ky.gov and select decisions of the KOSH review commission.

depositions are not permitted 'Except by special order.'" This of course also applies to interrogatories.

In The Okonite Company, KOSHRC 4734-10, dated June 1, 2010, we said "because of what the employer knows about the inspection, it is the rare case where discovery beyond the permitted requests for admission is necessary, hence our rule limiting discovery. Sections 26 (1) and 27 (1)." Page 4.

Kentucky's rules of civil procedure contain a provision, similar to ours on discovery, which places limitations on an aggrieved party's ability to obtain interlocutory review of a decision entered by a court of appeals, meaning either a circuit court or the court of appeals. It says "Such review is a matter of judicial discretion and will be granted only when there are special reasons for it." CR 76.20 (1) (emphasis added) Our Kentucky supreme court has seen fit not to further define the term special reasons. Nevertheless, special conveys the idea that neither discretionary review to the supreme court nor discovery according to our rule 27 can be had without a showing of some special fact, circumstance or need.

The Oxford English Dictionary, on line edition, gives the following definition for special: "Of such a kind as to exceed or excel in some way that which is usual or common; exceptional in character, quality, or degree." Special then for our purposes means unusual, uncommon, exceptional. We have always interpreted our rule on discovery by deposition or interrogatory, section 27, to mean discovery will only be granted when the moving party presents a justification which is out of the ordinary or is exceptional. The Okonite Company, supra, page 4.

When examining a party's request to pursue discovery by deposition or interrogatory, we first determine if the information sought is privileged or irrelevant, CR 26.02 (1), or if there is some independent, legal reason for denying the motion. Then we determine whether the party

seeking discovery has demonstrated some exceptional need or circumstance. Section 27, 803 KAR 50:010.

In our experience complainant secretary seldom pursues discovery because he has the benefit of the inspection performed by an experienced compliance officer. Emerson, in addition to its own report, has received the reports for the other subcontractors on the work site at the time of the collapse as well as all photographs taken by the CO. If the case goes to trial, Emerson will receive the redacted notes taken by the compliance officer after the CO has testified on direct examination. Morel, supra. Emerson's owners participated in a walk around inspection on the day of the accident, satisfying KRS 338.111 which gives employers and employees the opportunity to accompany the CO during his inspection. While Emerson complains it was wrongfully denied the opportunity to participate in the CO's first walk around inspection because it was not on site at the time, it can point to no authority supporting its claim. Emerson, thus, had the benefit of accompanying the compliance officer on his inspection; Emerson saw what the compliance office saw on the day the cinder block structure collapsed, a considerable advantage. Emerson knows far more about its business and industry than the CO will ever learn as a result of his inspection. The Okonite Company, supra, pages 3-4.

Emerson received administrative notice of the charges against it when it was served, first with the citation and then with labor's complaint. At trial Emerson will receive due process of law. See the commission's procedural regulations found at 803 KAR 50:010; these regulations say parties have the opportunity to subpoena witnesses for a trial on the merits of the citation, to examine and cross examine witnesses and to appeal the hearing officer's recommended order to the full commission. Our hearings are governed by the Kentucky rules of evidence. Because our

rules provided for due process of law, we were exempted from KRS chapter 13B. KRS 13B. 020 (3) (d) (4).

In Goldberg v Kelley, 397 US 254, 267-268, 90 SCt 1011, 1020, 25 LEd2d 287 (1970), the US Supreme Court said:

> 'The fundamental requisite of due process of law is the opportunity to be heard'...The hearing must be 'at a meaningful time and in a meaningful manner'...In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Discovery, according to Goldberg, is not required for due process. Rather, provisions for discovery are found in the civil rules for court cases and our procedural regulations. As we said in Chemcentral, supra, "Discovery, after all, is not automatically afforded to litigants in administrative proceedings. Weinberg v. Commonwealth of Pennsylvania, Insurance Department, Pa., 398 A2d 1120 (1979)." At page 8. See also Kelly v United States Environmental Protection Agency, 203 F3d 519, 523 (CA7 2000), where the seventh circuit said "there is no constitutional right to pretrial discovery in administrative proceedings." As an alternative, the court said "Kelly...could have investigated the government's motives by cross-examining witnesses during the administrative hearing, by requesting government documents..."

We will now examine each interrogatory submitted by Emerson to see whether the company has made a case, according to CR 26.02 (1), KRE 501, KRE 508 and section 27 of our rules, for compelling its answer.

Emerson's interrogatory 16 asks for "details, including actual quoted statements, of the alleged statements by representatives of Respondent that allegedly illustrate that Respondent created a hazardous condition on the subject job site." (emphasis added) Although the meaning

of this interrogatory is unclear, we presume Emerson wants statements made by Emerson's owners to the compliance officer during the second, Emerson walk around inspection. In its brief to the commission Emerson draws our attention to the CO's report where he wrote "Mr. Emerson made multiple statements that illustrate Emerson Masonry created the hazardous condition at the job site." Brief, page 13. (emphasis added) Because the two underlined clauses are identical, we find interrogatory 16 asks for information an Emerson owner provided the CO during the walk around. Discovery of the detailed description of a document is the equivalent to the discovery of the document itself. Peterson v US,[9] 52 FRD 317, 320 (SD Ill. 1971). Whatever Mr. Emerson told the compliance officer during the walk around inspection will be found, if it exists, in the CO's redacted notes. For respondent to discover whether Mr. Emerson made admissions, or matters in exoneration, not recorded in his notes, this can be accomplished by cross examination. Kelly v United States, supra. Complainant is directed not to answer interrogatory 16. The same logic applies to interrogatory 9 which seeks information about requests for admission. Complainant is directed not to answer interrogatory 9.

Interrogatories 10 and 19 seek information about B&B Contracting and other contractors; the information sought is irrelevant and complainant is directed not to answer them. CR 26.02 (1).

Interrogatories 3, facts, 15, photographs and 17, employer knowledge, raise questions which the secretary will in our experience answer by the direct examination of the compliance officer. Kelly v United States. Ormet Corporation, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), says the secretary must prove four elements including employer knowledge and whether respondent violated the terms of the standard. None of these

[9] Because our discovery rules preempt the civil rules of procedure, we do not look to Peterson as authority; rather we are persuaded by its logic.

interrogatories presents any special circumstance or need for the information and so complainant shall not answer 3, 15 or 17. Section 27.

For interrogatories 11, 12, 13 and 14 respondent wants labor to define terms found in the regulation it allegedly violated and the citation issued by the secretary: "adequately braced," "adequately supported," and "permanent supporting." In its brief Emerson said the cited standard is vague or at least contains vague terms. Emerson also said labor "must give notice of the nature of its case." Brief at page 6. While it is true the concrete and masonry construction subpart contains no definition of the terms, we are not sure, without facts which can only come forth at a hearing, whether the cited regulation is vague. Section 1926.706 (b) says

> All masonry walls over eight feet in height shall be adequately braced to prevent overturning and to prevent collapse unless the wall is adequately supported so that it will not overturn or collapse. The bracing shall remain in place until permanent supporting elements of the structure are in place.
>
> (emphasis added)

In Concrete Metal Forms, Inc, CCH OSHD 31,485, page 44,617, BNA 18 OSHC 1494, 1495 (1998), a federal administrative law judge, writing about a regulation in the concrete and masonry subpart which contains some of the same terms used in our cited standard, said "The standard is clear and unambiguous." Here is the regulation referred to by Judge Welsch:

> The single post shores shall be adequately braced in two mutually perpendicular directions at the splice level. Each tier shall also be diagonally braced in the same two directions.
>
> 1926.703 (b) (8) (iv) (emphasis added)

If 1926.703 (b) (8) (iv) is clear and unambiguous, then likely 1926.706 (b) is as well. And if the cited regulation is not vague, then it presents no unusual or exceptional circumstances

which, under our law on discovery, would require a special order from the commission permitting interrogatories. Section 27.

Even if the cited regulation turns out to be vague, we will not be able to make that determination until after the witnesses have testified at the trial and we can then analyze the facts, the regulation and the law. On this issue we are not here today taking a position either way.

In F. A. Gray, Inc v Occupational Safety and Health Review Commission, 785 F2d 23, 24-25 (CA1 1986), CCH OSHD 27,520, page 35,692, BNA 12 OSHC 1705, 1706, a case brought to our attention by Emerson in its brief to us, the court, confronted with a vaguely worded regulation, said:

> In *Cape & Vineyard,*[10] this court, concerned about the fairness of assessing penalties under a vaguely worded, open-ended regulation like the one before us, held that such a regulation, at least ordinarily, must be 'read to penalize only conduct unacceptable in light of the common understanding and experience of those working in the industry.'

Restating, the court said "Normally, the standard of conduct would be established by reference to industry custom and practice." In Gray federal OSHA and the company called witnesses who testified about "industry practice." Of course, labor has the burden of proof in our cases and it is always up to respondent to decide whether it wishes to call witnesses. ROP 43.

In any event, when a regulation is seen to be vague, the matter is resolved according to "the common understanding and experience of those working in the industry," - in other words, by facts brought out at trial. Here again, respondent Emerson has not raised any unusual or exceptional circumstances which would call for a special order for discovery. Section 27.

We therefore order the secretary not to answer interrogatories 11, 12, 13 and 14.

[10] *Cape & Vineyard Division of New Bedford Gas v OSHRC*, 512 F2d 1148 (CA1 1975), CCH OSHD 19,378, BNA 2 OSHC 1628.

Interrogatory 18 asks for legal conclusions. This is a matter for argument, not interrogatories which seek facts. Complainant is directed not to answer interrogatory 18.

Interrogatory 5 asks for witness information. Our hearing officers always order the parties to submit witness and exhibit lists prior to trial. Complainant is directed not to answer interrogatory 5. The same reasoning applies to interrogatory 6, exhibits; the complainant is directed not to answer.

Interrogatory 2 asks labor to answer questions about the compliance officer. When the compliance officer takes the stand, the first thing he does is answer questions about his education, his history as a compliance officer – in other words his qualifications. Information about other cases where he has testified is irrelevant. CR 26.02 (1). Complainant is directed not to answer interrogatory 2. Similarly, complainant is directed not to answer interrogatory 1. Neither interrogatory 1 nor number 2 present the unusual or exceptional circumstances necessary for this commission to issue a special order for discovery. Section 27 of our rules.

Interrogatory 7 asks for exculpatory evidence. Because the commission has its own rules of procedure, we are exempt from KRS chapter 13B. KRS 13B.020 (3) (d) (4) and 13B.090 (3). We direct complainant not to answer number 7.

Emerson knows the name of the inspecting compliance officer and well as the name of the supervisor who signed the citation. Emerson may issue subpoenas to insure their presence at the trial, although in our experience the compliance officer is always the secretary's witness as he has the burden of proof. And so we direct complainant not to answer interrogatories 4 and 8. Neither 4 nor 8 present any unusual or special circumstance or need for the information. Section 27.

We issue a protective order for all of the tendered interrogatories.

With this interlocutory appeal resolved, we lift our stay and remand the case to the hearing officer for a trial on the merits..

It is so ordered.

August 3, 2010

Faye S. Liebermann

Michael L. Mullins

Paul Cecil Green

Certificate of Service

I certify a copy of this order on interlocutory appeal was this August 3, 2010 served on the following in the manner indicated:

By messenger mail:

Mark F. Bizzell
Kentucky Labor Cabinet
Office of General Counsel
1047 US Highway 127 South, Suite 2
Frankfort, Kentucky 40601

Michael Head
Hearing Officer
Administrative Hearings Branch
1024 Capital Center Drive – Suite 200
Frankfort, Kentucky 40601-8204

By US mail:

Todd B. Logsdon
Mark J. Gomsak

Fisher and Phillips
220 West Mainstreet, Suite 2000
Louisville, Kentucky 40202

____
Frederick G. Huggins